owners, we know from *Cable & Wireless* that this foreseeable effect does not invalidate an otherwise lawful exercise of Commission authority.[66]

The RAA claims that "[e]ven if a contract between a building owner and a LEC could be considered discriminatory, it would be the building owner and not the LEC that was discriminating."[67] The validity of this assertion is doubtful and, again, it confuses *in personam* jurisdiction with subject matter jurisdiction. That a carrier's method of entry into a building must be regulated vis-à-vis other carriers is obvious when one considers the potentially anticompetitive but otherwise undetectable activities of the ILEC. That is, the RAA claims that the ILECs are the entities with market power.[68] Without exempting the building owner from the category of entities with market power, it cannot be gainsaid that the ILECs, too, maintain substantial leverage in negotiations with building owners. The ILECs may seek to use this leverage in a manner that grants them preferential access treatment over their new entrant competitors, be it through exclusive agreements, avoiding payment entirely, demanding lower access fees than those imposed on new entrants, or enjoying faster approvals for equipment installation. A prohibition on receiving such discriminatory treatment is similar in form and purpose to the prohibition on receiving discriminatory international settlement rates. Similarly, the "harsh remedies" occasionally produced by the filed rate doctrine are necessary to ensure that common carriers do not circumvent nondiscrimination requirements by deliberately

---

66 Cable & Wireless PLC v. FCC, 166 F.3d 1224, 1230 (D.C. Cir. 1999) ("To be sure, the practical effect of the Order will be to reduce settlement rates charged by foreign carriers. But the Commission does not exceed its authority simply because a regulatory action has extraterritorial consequences. . . . .Indeed, no canon of administrative law requires us to view the regulatory scope of agency actions in terms of their practical or even foreseeable effects.")(citations omitted).

67 RAA Comments at 53.

68 RAA Comments at 41.

"misquoting" a rate to a customer and then being bound to that misquoted (*i.e.*, preferential) rate.[69] The same principle operates here. Whether discrimination is a function of the building owner's unilateral behavior or arises out of implicit or explicit direction from the ILEC is difficult to detect. In the absence of a workable method to detect the origins of this behavior, the profound threat to competition warrants a federal policy prohibiting carriers from receiving discriminatory access treatment. The Commission's jurisdiction in this regard is unquestionable.

b. THE AMBASSADOR APPROACH PROVIDES *IN PERSONAM* JURISDICTION OVER MTE OWNERS THROUGH APPLICATION OF SECTION 411(A).

With respect to *in personam* jurisdiction over building owners, the RAA assumes that the *Ambassador* court permitted the injunction over hotels because they were subscribers.[70] This is not the case. The injunction authority arose from Section 411(a). The Supreme Court noted that "one can hardly gainsay the Government's assertion that the appellants here are persons interested in and affected by the regulation in question and, therefore, are proper parties defendant in the action and injunction could properly issue against them."[71] Nothing in Section 411(a) suggests that the universe of "any" persons "interested in or affected by" the FCC's consideration of a practice is limited to a carrier's subscribers. The application of the equivalent joinder provision in the Interstate Commerce Act to entities other than customers of carriers supports this view.[72] Indeed, the Commission itself has utilized Section 411(a)'s joinder

---

69 See Maislin Industries, U.S., Inc. v. Primary Steel, 497 U.S. 116, 127-128 (1990).

70 RAA Comments at 47.

71 Ambassador, 325 U.S. at 325.

72 See, e.g., United States v. Baltimore & O.R. Co., 333 U.S. 169, 171 n.2 (1948)(jurisdiction over stock yard practices); see id. at 177 ("Of course it does not deprive a property owner of his property without due process of law to deny him the right to enforce conditions upon its use which conflict with the power of

mechanism to bring in non-subscriber parties to a proceeding.[73] The RAA's assertion that "[t]he only rights a carrier has against a building owner that can be enforced under Section 411(a) are those related to the provision of the carrier's service"[74] is partially correct -- the practice must affect a matter within the subject matter jurisdiction of the FCC, such as the competitive provision of facilities-based telecommunications service. But the RAA's statement misses the point that the joinder provision enables the Commission to carry out the goals of the Communications Act, regardless of whether the obstructive force -- or, more precisely, the party interested in or affected by the practice under consideration -- is a carrier, a subscriber, or a third party.

2. THE AMBASSADOR COURT'S CONCLUSION DID NOT DEPEND ON THE NATURE OF THE HOTEL-CARRIER RELATIONSHIP.

Finally, nothing in the *Ambassador* case suggests that the nature of the relationship between the hotels and the carriers was material to the Court's approval of the injunctive process used by the Commission. The Court actually states otherwise. In discussing the argument over whether or not the hotel was a subscriber of the telephone company, the Court concludes that

---

Congress to regulate railroads so as to secure equality of treatment of those whom the railroads serve."); see also United States v. City of Jackson, Mississippi, 318 F.2d 1, 9-11 (5th Cir. 1963)(enjoining sheriff's enforcement of racially segregated waiting areas in railroad and bus terminals, and citing to the extensive use of Section 42 of the Interstate Commerce Act to enjoin the practices of non-carriers).

73 See, e.g., Better T.V., Inc. of Dutchess County, N.Y. v. New York Telephone Co., Docket No. 17441 et. al, *Memorandum Opinion and Order and Certificate*, 18 FCC2d 783 at ¶ 13 (1969); Armstrong Utilities v. General Telephone Company of Pennsylvania, File No. P-C-7649, *Memorandum Opinion, Order and Temporary Authorization*, 25 FCC2d 385 at ¶ 8 (1970); Warrensburg Cable, Inc. v. United Telephone Co. of Missouri, Docket Nos. 19151, 19152 P-C-7655 P-C-7656, *Memorandum Opinion and Order*, 27 FCC2d 727 at ¶ 22 (1971); Comark Cable Fund III v. Northwestern Indiana Telephone Co., File No. E-84-1, *Memorandum Opinion and Order*, 103 FCC2d 600 at ¶ 15 (1985); Continental Cablevision of New Hampshire, Inc., Docket No. 20029, *Memorandum Opinion and Order*, 48 FCC2d 89 at ¶ 6 (1974).

74 RAA Comments at 48.

> [w]e do not think it is necessary in determining the application of a regulatory statute to attempt to fit the regulated relationship into some common-law category. It is sufficient to say that the relation is one which the statute contemplates shall be governed by reasonable regulations initiated by the telephone company but subject to the approval and review of the Federal Communications Commission.[75]

Hence, it becomes clear that the Commission's authority to address the manner in which a carrier obtains access to a building vis-à-vis its competitors is highly relevant to the implementation of the Communications Act and the agency's enabling statute provides the *in personam* jurisdiction to regulate effectively.[76]

V. THE COMMISSION MUST IMPLEMENT SECTION 224 CONSISTENT WITH THE PRO-COMPETITIVE GOALS OF THE 1996 ACT TO ENSURE NONDISCRIMINATORY ACCESS TO MTES BY COMPETITORS.

A. SUBSTANTIAL JUDICIAL PRECEDENT AND SOUND PUBLIC POLICY SUPPORT THE COMMISSION'S CONCLUSION THAT RIGHTS-OF-WAY UNDER SECTION 224 EXTEND INTO BUILDINGS.

The RAA erroneously asserts that the Commission's construction of Section 224 is incorrect because "there is no such thing as a 'right-of-way' inside a building."[77] However, there is substantial precedent to support the proposition that rights-of-way exist in buildings. Moreover, such a determination is supported by the pro-competitive policies behind Section 224.

---

75 Ambassador, 325 U.S. at 326.

76 The SBPP does not dispute the RAA's contention that Section 411(a) applies only in adjudications. RAA Comments at 46-47. The joinder of building owners utilizing an *Ambassador* approach would occur in the context of adjudications before the Commission.

77 RAA Comments at 57; see also Commonwealth Edison Comments at 3 ("We are aware of no authority, and the Commission has cited none, which holds that a 'right-of-way' at common law extends into buildings.").

RAA disregards the law concerning rights-of-way and easements in order to further its cramped and anti-competitive interpretation of Section 224.[78]

In the *Report and Order*, the Commission correctly concluded "that the obligations of utilities under Section 224 encompass in-building facilities, such as riser conduits, that are owned or controlled by a utility" and that "this interpretation is consistent with the plain meaning of Section 224(f)(1), which requires 'non-discriminatory access to *any* pole, duct, conduit, or right-of-way owned or controlled' by a utility, without qualification."[79] This interpretation is consistent with well-established judicial precedent.

The term right-of-way is equivalent to an "easement."[80] An easement is defined as a "non-possessory right to enter and use land in possession of another."[81] The term "land" may be

---

78 RAA Comments at 57-59. For example, RAA contends that "[b]ecause there is no right of unimpeded access inside a building, there is no right of passage that conforms to the definition of a 'right-of-way.'" Id. at 58. RAA's objection is premised on an incorrect reading of the law. The enjoyment of an easement is subject to the reasonable interference of the property owner. Under Section 224, telecommunications carriers are entitled to nondiscriminatory access to whatever access rights are held by the utility, whose entry also may be limited to certain hours or conditions. Moreover, such objections are more appropriately contained in a petition for reconsideration of the *Report and Order* (and, indeed, RAA has included such objections in its petition for reconsideration). The Commission does not seek comment on whether rights-of-way under Section 224 exist in buildings (the Commission has correctly concluded that they do), but rather seeks comment on the extent of such utility rights-of-way in buildings. *Report and Order* at ¶ 170.

79 *Report and Order* at ¶ 80 (citing 47 U.S.C. § 224(f)(1)(emphasis in original)).

80 See, e.g., Board of County Supervisors v. United States, 48 F.3d 520, 527 (Fed. Cir. 1995) ("'Rights-of-way' are another term for easements, which are possessory rights in someone else's fee simple estate"), cert. denied, 516 U.S. 812 (1995); The Wilderness Society v. Morton, 479 F.2d 842, 853 (D.C. Cir. 1973) (*en banc*)(right of way includes any "right of passage over another person's land" including revocable permits, revocable licenses, and easements) cert. denied, 411 U.S. 917 (1973); Ryan Mercantile Co. v. Great Northern Rwy. Co., 294 F.2d 629, 638 (9th Cir. 1961) ("The term 'right-of-way' is defined as meaning a right of passage over another person's land . . this definition has been so universally incorporated into innumerable decisions that it may be said to be generally accepted."); City of Manhattan Beach v. Sup. Ct. of Los Angeles Co., 914 P.2d 160, 166 (Ca. 1996) (in the absence of a contrary intent to create a fee interest, conveyance of a right-of-way creates an easement); Nerbonne, N.V. v. Fla. Power Corp., 692 So.2d 928, n.1 (Fla. App. 1997) (conveyance of a right of way is generally held to create an easement).

Notably, although Section 224's use of the term rights-of-way includes easements, it should be not be limited to easements. A competitor's access to utilities' rights-of-way should not be dependent upon the type of real property interest that the utility holds in the real estate over which the right-of-way passes. The Commission has recognized that "a 'right-of-way' under Section 224 includes property owned by a utility

used interchangeably with "property" and includes anything that may be classified as real estate or real property.[82] Real estate or real property includes land and anything that is affixed to the land, such as buildings.[83] Thus, the access rights granted competitors under Section 224 includes access to rights-of-way and easements in buildings.

An early case recognizing an easement associated with a building is Baseball Publishing Co. v. Bruton.[84] In this case, the Massachusetts Supreme Court recognized an easement "giving the plaintiff the 'exclusive right and privilege to maintain [an] advertising sign . . . on [the] wall of [a] building,' but leaving the wall in possession of the owner with the right to use it for all purposes not forbidden by the contract and with all the responsibilities of ownership and control."[85] It is not at all uncommon for easements to provide access to and through structures such as buildings, garages, and other real property. The Second Circuit, for example, resolved a negligence action involving an easement running through a building including its stairways, lobbies, and vestibules.[86] Likewise, the D.C. Circuit -- in a case involving the scope of a family

---

that the utility *uses in the manner of* a right-of-way as part of its transmission or distribution network." *Report and Order* at ¶ 83 (emphasis added). The Commission's determination that a utility must provide access to property that it uses like a right-of-way, but which is not a right-of-way, underscores the notion that the term right-of-way must be construed broadly, regardless of the classification of the particular property interest.

81 RESTATEMENT (THIRD) OF PROPERTY § 1.2 (2000).

82 See BLACK'S LAW DICTIONARY 606 (6th ed. 1991); id. 845-46.

83 Id. 847.

84 302 Mass. 54 (1938).

85 Id. at 56.

86 See Monaghan v. SZS 33 Assocs., 73 F.3d 1276, 1279 (2d Cir. 1996) (describing an easement through a commercial building); see also In re Lamont Gear Company, No. 95-17033DAS, 1997 Bankr. LEXIS 979, *34 (Bankr. E.D. Pa. 1997) (describing rights of access of tenants of a building to areas belonging to others in order to make use of the building's entrances).

trust -- noted that a lessor possessed an "easement for parking in an existing garage."[87] Thus, the Commission must continue to interpret Section 224's reference to rights-of-way broadly to include all rights-of-way held by the utility, including those in and through buildings.

Even if the Commission's conclusion that rights-of-way may extend into buildings were not amply supported by judicial precedent, it would be within the Commission's authority to extend the definition of rights-of-way in this manner. Determining which utility facilities and rights are subject to a federal statutory scheme is a fundamental element of the Commission's responsibility under Section 224. The Commission's interpretation of Section 224's reference to rights-of-way to include in-building facilities and access is wholly consistent with the pro-competitive policies of Section 224. In the *Report and Order*, the Commission confirmed that access to in-building conduits and rights-of-way is crucial to the development of telecommunications competition in MTEs.[88] CLECs often need access to in-building duct, conduit, and rights-of-way used by incumbent LECs and other utilities to order to expand their networks and serve buildings.[89] An ILEC or other utility that has been granted access to facilities in a building has the ability to refuse to allow a competitor access to these facilities to serve customers in a building.[90] The power to deny competitors access to in-building conduits or

---

87 See Burka v. Aetna Life Ins. Co., 56 F.3d 1509, 1511 (D.C. Cir. 1995) (describing an easement for parking in a garage); see also In re Dayhuff, 185 B.R. 971, 972 (Bankr. N.D. Ga. 1995) (describing easements through the common areas of an office complex).

88 *Report and Order* at ¶ 77.

89 Id.

90 Id. at ¶ 78.

similar pathways could impose a serious impediment to telecommunications choice for affected residents.[91]

B. THE COMMISSION MUST CONSTRUE THE TERM "RIGHTS-OF WAY" UNDER SECTION 224 TO INCLUDE THE FULL PANOPLY OF RIGHTS HELD BY UTILITIES IN MTEs.

As stated in SBPP's initial comments, it is critical that the Commission construe Section 224's definition of "rights-of-way" consistent with the pro-competitive goals of the 1996 Act to reflect the broad utility easements typically granted to utilities by building owners to install and upgrade their facilities to serve tenants.[92] The Commission has confirmed that the exact classification of the underlying property interest should not affect competitors' access to utility rights-of-way:

> We believe, consistent with Congressional intent to ensure that utilities do not exercise their control over structures and other areas to which providers seek access in a manner that impedes telecommunications competition or cable service, that a "right-of-way" should be read to include, at a minimum, any defined pathway in an MTE that a utility is actually using or has specifically identified for its future use, regardless of how its right of access is denominated by the parties under state law. We do not believe that state concerns with definitions of property interests, including public rights-of-way, will be harmed or affected by the nomenclature we use here solely with reference to Section 224. We therefore conclude that the nature of a right of access, and not the nomenclature applied, governs for these purposes.[93]

However, the initial comments of several parties, including several utilities, RAA, and SBC, among others, apply an unreasonably constrained interpretation of the term "right-of-way" to contend that Section 224 does not include within its purview rights-of-way in MTEs. Moreover,

---

91 Id.

92 See AT&T Comments at 46 ("[T]he Commission should decline to narrow, categorically, the definition of right-of-way.").

93 *Report and Order* at ¶ 82 (emphasis added).

even if willing to acknowledge that rights-of-way under Section 224 exist in MTEs, these commenters would limit the definition of rights-of-way in MTEs to a narrow right to attach telecommunications equipment to utilities' existing facilities.

For example, Florida Power & Light ("FPL") argues that the term "right-of-way" as used in Section 224 refers only to the "land itself" over which the right passes, while "[t]he rights which determine what use [and by whom] may be made of that land are abstract concepts . . . [that are] without material substance and cannot be attached to."[94] Under this limited interpretation, a telecommunications carrier presumably would never be permitted to place its facilities in a utility right-of-way, unless the utility itself had first placed its own facilities in the right-of-way, permitting the carrier to then attach its equipment to the utility's poles, ducts, or conduits. Such an interpretation would read the term "right-of-way" out of the statute entirely, a result that should generally be avoided in statutory construction.[95] The interpretation urged by FPL ignores the well-accepted dual meaning of the term "right-of-way."[96] It is used to describe both "a right belonging to a party to pass over land of another" and the strip of land itself.[97] FPL's cabined interpretation of the statutory term should be disregarded because it is inconsistent with established judicial precedent.

---

94 Comments of Florida Power & Light ("FPL") at 6-7.

95 See Walters v. Metropolitan Educational Enterprises, 519 U.S. 202, 209 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect.") (citing United States v. Menasche, 348 U.S. 528, 538-39 (1955)); Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992) ("[C]ourts should disfavor interpretations of statutes that render language superfluous . . . .").

96 See Joy v. St. Louis, 138 U.S. 1, 44 (1891) ("[T]he term 'right-of-way' has a twofold signification."); see also Danaya C. Wright and Jeffrey M. Hester, Pipes, Wires, and Bicycles: Rails to Trails, Utility Licenses, and the Shifting Scope of Railroad Easements From the Nineteenth to the Twenty-First Centuries, 27 ECOLOGY L.Q. 351, 391-97 (2000) (discussing the "dual meaning of the term 'right-of-way'").

97 See Joy, 138 U.S. at 44 ("[The term 'right-of-way'] sometimes is used to describe a right belonging to a party, a right of passage over any tract; it is also used to describe that strip of land which railroad companies take upon which to construct their roadbed.").

Moreover, the Commission should not assume that Congress' choice of the term right-of-way extends only to the right to pass over land, and not to install facilities, as RAA contends.[98] The proper inquiry in determining whether a claim qualifies as a right-of-way is its creation of a right to use land. The Supreme Court of Colorado has recognized that, "[i]n the absence of additional descriptive language, 'right-of-way,' when used to describe an ownership interest in real property, is traditionally construed to be an easement."[99] An easement is, most fundamentally, a non-possessory right to use the land of another for some purpose, sometimes for a broad purpose, such as the provision of utility services, and not simply the right to pass over the land, as with a road or lane.[100]

For example, the Eighth Circuit Court of Appeals has defined a railroad's right-of-way as entailing an entitlement "to the use of the land for the purpose of operating a railroad."[101] Recognizing the same principle, the D.C. Circuit Court of Appeals resolved a controversy concerning the Secretary's authority to issue rights-of-way under a statute by concluding that the Secretary of the Interior "has authority to issue rights-of-way . . . for 26 communication sites

---

98 RAA Comments at 58 ("The holder of a right-of-way may only use the right to pass from one point to another.").

99 Hutson v. Agricultural Ditch & Reservoir Co., 723 P.2d 736, 739 (Colo. 1986). See also Northern P.R. Co. v. Townsend, 190 U.S. 267, 271 (1903) (describing a particular right-of-way as conferring "perpetual use of the land for the legitimate purposes of the railroad."); United States v. Great N. R. Co., 32 F.Supp. 651, 654 (D. Mont. 1940) (noting that a "consensus of opinion" suggests that right-of-way means "the right to use the grant of right of way for the purpose of constructing, maintaining, and operating a railroad thereon."); Lincoln Sav. and Loan Ass'n v. State, 768 P.2d 733, 735 (Colo. App. 1988) (referring to rights-of-way granted "over, across, or upon certain lands..."); Veach v. Culp, 599 P.2d 526, 528 (Wash. 1979) (holding that plaintiffs were entitled to "use the right-of-way in such a manner as does not materially interfere with the railroad's use thereof."); Southern Pacific Co. v. Burr, 24 P. 1032, 1033 (Cal. 1890) (discussing railroad with right-of-way to "use the land for ... its railroad and telegraph line..."); Kansas C.R. Co. v. Allen, 22 Kan. 285, 293 (Kan. 1879) (describing a railroad's right-of-way as "the right to use the land for its purposes...").

100 JON W. BRUCE AND JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 1.01, at 1-2 - 1-4 (rev. ed. 1994).

101 Energy Transp. Systems, Inc. v. Union Pac. R. Co., 619 F.2d 696, 700 (8th Cir. 1980).

[and] construction of pumping stations."[102] By the reasoning of these decisions, it is "use" of a servient property that characterizes a right-of-way. They convey no indication that a right-of-way is limited to a physical passing over of the land, such as by the stringing of wires on existing poles.[103]

Courts frequently construe right-of-way grants in a technologically-neutral manner that would support this approach. The Supreme Court of Massachusetts, for instance, cautioned more than sixty years ago that it would "be very slow to hold that even ancient rights of way, not expressly restricted as to the type of vehicle, could not be employed at all for the means of transportation in common use by a succeeding generation."[104] Rights-of-way, then, adapt to new technologies. Just because all interested parties did not anticipate a particular use does not render that use beyond a right-of-way's fair and legitimate scope.[105]

The practical effect of the limited interpretation of "rights-of-way" urged by FPL and others would be that utilities and building owners could control what distribution technology may be used by competitors -- the exact result Congress sought to avoid in enacting Section 224. In other words, as described in SBPP's initial comments, if the Commission declines to expand

---

102 Wilderness Society, 479 F.2d at 848 (holding that the Secretary's statutory authority was not limited merely to the issuance of rights-of-way for sections of pipe, but also for all components necessary to make a pipeline functional).

103 Even if this was not the case, however, telecommunications providers would arguably satisfy any "passing over" requirement, since their utilization of rights-of-way allows information to pass over a servient property on its way to a selected destination, regardless of the technology utilized.

104 Swensen v. Marino, 29 N.E.2d 15, 18 (Mass. 1940).

105 See, e.g., Henley v. Continental Cablevision of St. Louis County, 692 S.W.2d 825, 829 (Mo. Ct. App. 1985) ("Although the cable television industry did not exist at the time the easement was granted, it is part of the natural evolution of communications technology. Installation of [cable television] equipment was consistent with the primary goal of the easement, to provide for wire transmission of power and communication."); Ziegler v.Ohio Water Service Co., 247 N.E.2d 728, 731 (Ohio 1969) (holding that the construction of a water main within a highway easement did not impose an added burden on the servient estate, noting that "[t]he complexities of modern life have produced uses of highways which would have been unheard of at the time many easements for public highways were granted").

the definition of a "right-of-way" under Section 224 beyond the spaces in MTEs that utilities are actually using or are specifically authorized to use, utilities will be able to determine which technologies can be offered by their competitors in particular buildings.[106]

In urging the Commission to adopt a narrow definition of rights-of-way under Section 224, several commenters seek to limit the scope of Section 224 in unnatural ways. For example, FPL argues that a utility would be required to grant a telecommunications provider access to its rights-of-way only if the utility has an interest classified as an easement under state law.[107] FPL states that "a utility would have no ownership or control over a right-of-way for purposes of Section 224 or interest in the land if it has merely a license, permit, or tariff alone to install facilities on a customer's premises."[108] This statement demonstrates the danger of relying on 50 different State laws to govern access to rights-of-way under Section 224 and is inconsistent with the Commission's holding in the *Report and Order* that the nomenclature of a right of access should not impede access by beneficiaries of Section 224.[109] A restrictive interpretation of right-of-way, such as the one proposed by FPL, would permit utilities to delay or prevent access by competitive providers to rights-of-way in MTEs by seeking interpretations that their rights-of-way should be classified as licenses, permits, or other interests in land. Rather, the Commission should adopt a federal definition of rights-of-way which includes the full panoply of rights held by utilities within MTEs, including rights of access to areas in MTEs.[110]

---

106 See SBPP Comments at 25-27.

107 See FPL Comments at 10.

108 Id.

109 *Report and Order* at ¶ 82.

110 As demonstrated in SBPP's Petition for Reconsideration of the *Report and Order*, federal agencies may be obliged to adopt federal definitions to govern federal administrative practices even where States may have

In considering the approach advocated by SBPP, the Commission should recognize that recent judicial precedents construing Section 224 also provide strong support for broad legal definitions of right-of-way. A Michigan district court recently rejected Ameritech's contention that the court "should apply the plain meaning of the term 'rights-of-way,' . . . and [that] the broader definition . . . applies only to railroad cases."[111] The court reasoned -- relying on the Commission's analysis in the *Local Competition First Report and Order* -- that "[i]t simply does not make sense to argue that Congress intended access to rights-of-way to be dependent upon the specific type of real estate interest held by the incumbent."[112]

FPL also misconstrues the proposal concerning the extent of utility rights-of-way contained in the *FNPRM*, characterizing it as a request for a "right . . . [of a cable or telecommunications carrier] under Section 224 to attach their facilities anywhere within the entire building."[113] To the contrary, the Commission is simply considering a construction of the terms of Section 224 to broadly reflect the type of access rights typically granted to utilities by building owners to install, maintain, and upgrade their facilities to serve tenants. Pursuant to the nondiscrimination component of Section 224, a beneficiary of this statute should be permitted to access all areas in an MTE ordinarily used for the transmission of telecommunications and other utility services, such as ducts, conduit, and rooftop rights-of-way, in the same manner that the

---

adopted their own divergent definitions for State matters. See, e.g., Moon Ho Kim v. INS, 514 F.2d 179, 181 (D.C. Cir. 1975) (rejecting a federal agency's resort to state law definitions of adultery for purposes of administering a federal statute and instead requiring the application of a uniform federal definition of adultery under the federal statute).

111 MCI Telecoms. Corp. v. Michigan Bell Tel. Co., 79 F. Supp. 2d 768, 782 (E.D. Mich. 1999); see also Joynt v. Orange County, 701 So. 2d 1249. 1250 (Fla. App. 1997) (holding that, as used in a Florida statute establishing the damages to be awarded in an eminent domain proceeding, "the term 'right-of-way' has an all-inclusive definition").

112 MCI, 79 F. Supp. 2d at 782.

113 FPL Comments at 12.

utility is permitted access. Adoption of a technologically-neutral definition of right-of-way would contribute to the removal of the bottleneck created by utilities' control over ducts, conduit, and rights-of-way perceived by Congress when it amended Section 224.[114]

By the same token, the Commission should reject FPL's assertion that the "MTE problem which the Commission addresses is not caused by utilities" and "should be implemented, if at all, under Section 251(b)(4) so as to apply only to incumbent LECs."[115] Section 224 represents Congress' clear judgment that utilities' control over poles, ducts, conduit, and rights-of-way create a bottleneck for the delivery of telecommunications services to all Americans. Congress explicitly included electric and other utilities within the definition of a utility.[116] Thus, it is entirely appropriate for the Commissions to apply its rules to all utilities, not just to ILECs.

Finally, the Commission should reject the argument of Broadband Office that Section 224 was intended to grant access only to "rights-of-way actually used to provide wire communication."[117] Broadband Office's analysis is erroneous because Section 224 does not limit rights-of-way to pathways used for wire communication. The Commission has confirmed that "use of any utility pole, duct, conduit, or right-of-way for wire communication triggers access to all poles, ducts, conduits, and rights-of-way owned or controlled by the utility,

---

114 *Report and Order* at ¶¶ 71-72.

115 FPL Comments at 16, 18.

116 47 U.S.C. § 224(a)(1).

117 BBO Comments at 20 (emphasis in original). RAA makes a similar argument in its Petition for Reconsideration of the *Report and Order*, stating that Section 224 "was never meant to run beyond the outdoor utility poles with aerial attachments or the outdoor ducts and conduits underground, or rights-of-way associated with these poles, ducts, or conduit." RAA Petition for Reconsideration in WT Docket No. 99-217 at 20-21 (filed Feb. 12, 2001). Such an interpretation would read the term "rights-of-way" out of Section 224 completely, a result that should be avoided in order to fully effectuate Congressional intent.

including those not currently used for wire communications."[118] Thus, beneficiaries of the access rights granted by Section 224 are entitled to access the entire network of a utility's poles, ducts, conduits, and rights-of-way if the utility uses any part of its network for wire communications.

C. CLECs Need Not Be Limited To Access To The Defined Spaces Used By The Utility Because Easements Typically Expand To Areas Not Previously Used And Change Over Time To Accommodate The Needs Of The Utility And Changes In Technology.

The Commission should be careful not to abridge the rights that attach to utilities' rights-of-way in MTEs. In the *Report and Order*, the Commission has limited the allowable scope of rights-of-way for Section 224 purposes by prematurely determining that "a broadly worded easement permitting a utility to place facilities throughout a building or 'in hallways' would not itself create a right-of-way under [the definition adopted by the FCC]."[119] Such an interpretation would limit competitive service providers' access to areas other than the specific pathway initially used by the utility.[120] In the FNPRM, the FCC has taken a constructive step toward adopting a different approach by asking for suggestions on how to interpret the extent to which utility rights-of-way within MTEs are subject to access by telecommunications carriers other than ILECs and to cable companies pursuant to Section 224.[121] To uncover that answer, the Commission specifically asks how it should define the scope of rights-of-ways in MTEs and

---

118 Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket Nos. 96-98 and 95-185, *First Report and Order*, 11 FCC Rcd 15499 at ¶ 1173 (1996)("*Local Competition First Report and Order*")(emphasis added).

119 See *Report and Order* at ¶ 82 (The FCC states that "right-of-way" is defined "at a minimum...a pathway [that] is actually used or has been specifically designated for use by a utility as part of its transmission or distribution network and . . . the unambiguous physical demarcation.").

120 As discussed infra, judicial precedent supports a broader interpretation of rights-of-way.

121 See *Report and Order* at ¶ 170.

whether the beneficiaries of Section 224 have a mandatory right of access to other areas of a building to affix facilities, and not just to the defined spaces occupied by the utility as part of its network.[122] The Commission should acknowledge that -- based on the weight of authority -- a right-of-way is not so limited a right.

Much litigation, primarily in state courts, has arisen over the years concerning the use of "rights-of-way" for utility and other purposes. While SBPP acknowledges that there are various state court interpretations concerning the scope of rights-of-way and easements, these interpretation are not so limited as FPL and other commenters contend. For example, these commenters argue that the scope of a right-of-way as used in Section 224 is limited to a strictly defined space.[123] Commonwealth argues, without any legal support whatsoever, that it is "nonsensical to conclude that [a] right of way [can] extend outside the pathways that have been defined for the utility's use."[124]

By adopting these versions of what the scope of easements include, the Commission risks undermining the ability of competitive telecommunications carriers to access customers in MTEs. The net effect will be to undermine the pro-competitive goals of section 224. However, the Commission is not obligated to accept these interpretations of the scope of rights-of-way. The weakness of these arguments begins with the assumption that a utility's right-of-way as used in Section 224 denotes only the defined space of the easement, and not the concomitant rights

---

122 Id.

123 See FPL Comments at 5 ("A right-of-way as used in Section 224 must be a defined space."); Commonwealth Edison Company and Duke Energy Corp. ("Commonwealth") Comments at 4; RAA Comments at 58-59 (arguing that "the concept of right of way" does not permit the placement of facilities outside of a defined space.).

124 Commonwealth Comments at 3-4.

that accompany it.[125] Such assertions miss the point. The issue for consideration is not whether a utility can own an amorphous right to an undefined space. Rather the issue concerns, as the Commission correctly noted, the rights and obligations of easement owners in relation to building owners.[126] The idea that the scope of a right-of-way must include a defined space ignores the extent of the rights that attach to easements.[127] For example, although a grant or reservation of an easement may be "specific in its terms," "the dominant owner may do such things as are necessary to the reasonable enjoyment of the easement."[128] "[A]n easement granted or reserved in general terms, without any limitations as to its use, is one of unlimited reasonable use."[129] At bottom, then, "[t]he owner of an easement is said to have all rights incident to or necessary to its proper enjoyment, but nothing more."[130] It is this notion of "reasonable enjoyment" that renders an easement a flexible concept.

Under the interpretations of the scope of an easement proposed by FPL and others, subsequent users of the easement would be limited to the defined space initially granted to the

---

125 See FPL Comments at 6; RAA Comments at 59.

126 See *Report and Order* at ¶ 170.

127 FPL cites 25 AM. JUR. 2d *Easements and Licenses* § 74 (1996) for the proposition that "a way must have a particular definite line." FPL Comments at 7, n.11. However, the next statement from that source states that "when an easement reserved by grant allows ingress and egress from any location throughout the servient estate, such use will be protected." 25 AM. JUR. 2d Easements and Licenses § 74 (1996). Thus, when placed in context, the precedent cited by FPL acknowledges that -- at a minimum -- the right of ingress and egress attaches to the easement or right-of-way.

128 25 AM. JUR. 2d *Easements and Licenses* § 82 (1996); see also C/R TV, Inc. v. Shannondale, 27 F.3d 104, 108 (4th Cir. 1994) (holding that "West Virginia cases construe easements to give the easement holder a right 'reasonably necessary' to carry out the purposes of the grant, *including the right to utilize technological improvements* . . . Determining the limitations on the applications of these principles, however, the court . . . marked the boundaries based on a proposed use's compatibility with the purpose of the grant, and the absence of any substantial increase in the burden on the servient estate.") (internal citations omitted)(emphasis in original).

129 25 AM. JUR. 2d *Easements and Licenses* § 83 (1996).

130 Id.

utility that first provided service to the MTE, and thus would not be able to upgrade their facilities to take into account changing circumstances or technology. For example, FPL contends that where the boundaries of an easement or right-of-way are not expressly described in the original grant or reservation, or the easement is created by prescription, "actual use" determines the dimensions of the right-of-way, thereby freezing the dimensions in time.[131] FPL further argues that even if an easement grants a "blanket" or "floating" right to affix and maintain utility wires, circuits and conduits, the "physical dimensions" of the easement would be determined by "actual use."[132] While it is generally accurate that the actual use of an easement that has not been defined by the parties will establish its general location on the property of the servient tenement, its bounds are also determined by "lines of reasonable enjoyment."[133] It would be surprising if utilities such as FPL were required to maintain their equipment and facilities in MTEs in exactly the same physical locations as when they were originally installed.

Indeed, its is well-established that the scope of an easement may be adjusted to reflect changes in technology, such as advancements in the transmission of telecommunications services. For example, the Supreme Court of Wyoming has held that "[t]he rights of the easement holder in another's land are determined by the purpose and character of the easement. The manner in which the easement is used does not become frozen at the time of grant."[134] Rather, "[c]hange [is] contemplated and must be accommodated in an advancing society."[135]

---

131 FPL Comments at 11.

132 Id. at 14-15.

133 25 AM. JUR. 2d *Easements and Licenses* § 74 (1996).

134 Wyoming v. Homar, 798 P.2d 824, 826 (Wyo. 1990) (holding that "construction and operation of a bus turnout on the right-of-way is a legitimate use of the road easement").

135 Id.

This proposition has been echoed by other courts that have held that not only the use can change but also the dimensions of the servitude may change over time as reasonably required by the dominant tenement.[136] Moreover, in order to accommodate these changes, there may be an increase in the volume and kind of use of an easement during the course of its enjoyment. For example, the Fourth Circuit has upheld a cable television operator's right under West Virginia law to use a general telephone utility easement to attach its cable television wires, even without the consent of the property owner, because "the use of a wire for the transmission of television signals is substantially compatible with the use given for the transmission of telephonic data and visual signals now enjoyed by [a telephone company]."[137]

Utilities typically have broad rights of access to MTEs that may not specifically contemplate the use of rooftops or other areas of the MTE to accommodate non-traditional transmission technologies.[138] However, pursuant to the broad rights granted utilities to access MTEs to provide service, the scope of these rights-of-way would generally permit them to expand their access to provide service to tenants using new technologies. Installing fixed wireless technology, for example, would require access to areas such as MTE rooftops, as well as

---

136 See, e.g., Centel Cable Television Co. of Ohio v. Cook, 567 N.E.2d 1010, 1014 (Ohio 1991) (holding that language in an easement "for which electric energy is now, or may hereafter be used," is "broad enough to encompass the development and expansion of the electronic medium of cable television"); Gendron v. Central Maine Power Co., 379 A.2d 1002, 1005 (Maine 1977) (rejecting an action to enjoin a utility from installing poles and transmission wire that would be longer and heavier than the original poles); Hoffman v. Capitol Cablevision System, Inc., 52 A.D.2d 313, 317 (N.Y. App. Div. 1976) ("A sufficiently broad interpretation [of commercial easements in gross for utilities] to meet progressive inventions is required."); Crowley v. New York Tel. Co., 80 Misc. 2d 570, 572 (N.Y. Dist. Ct. 1975) ("Just as we must accept scientific advances, we must translate the rights of parties to an agreement in light of such developments.").

137 See C/R TV, Inc., 27 F.3d at 109.

138 *Report and Order* at ¶ 88 ("[E]xisting utility rights-of-way in MTEs, whether created by force of law, by written agreement between the parties, or tacit consent, generally originated in an era of monopoly utility service" and "the purpose behind these rights of access was to ensure that end users could receive service from the single entity capable of providing, or legally authorized to provide, such service."); see Cox Communications Comments at 13 ("[M]ost incumbents already have . . . easements [to reach tenants in MTEs].").

other areas in buildings that incumbents might already use to provide service, such as riser conduit and spaces in the building's basement or utility closets. As noted by GSA, "a 'wireless' LEC requires the same functionalities in the interior of the MTE as the 'wireline' carrier, as well as an additional capability -- rooftop access."[139] Competitors must be afforded the same broad access if Section 224 is to be fully implemented to restrain the ability of utilities to behave anticompetitively toward telecommunications competitors.

D. UTILITY EASEMENTS AND RIGHTS-OF-WAY ARE TYPICALLY APPORTIONED WITHOUT THE CONSENT OF THE SERVIENT ESTATE OWNER.

Several commenters mistakenly contend that utilities' rights to access MTEs are very narrow and would not accommodate telecommunications facilities.[140] CAI, for example, argues that consent of the building owner always would be required because "the scope of an easement cannot be modified without the consent of the owner of the property subject to the easement."[141] However, these commenters' objections are belied by the substantial body of case law holding that utility easements may generally be apportioned without the consent of the building owner in order to accommodate additional facilities that are not inconsistent with the easement, such as cable television and telecommunications equipment.[142]

---

139 GSA Comments at 5.

140 See Commonwealth Edison Comments at 4 ("Electric utilities simply do not have the right, however defined, to place their wires outside of pathways which have been identified for electric wiring."); RAA Comments at 60 ("Such rights as utilities typically have are very narrow.); Comments of United Telecom Council and Edison Electric Institute ("UTC/EEI") at 6 (Utilities' "highly restricted right of access [in an MTE] is too narrow in physical scope . . . to be of any practical use to cable television operators and telecommunications providers.").

141 CAI Comments at 3.

142 Hise v. Barc Electric Coop., 492 S.E.2d 154, 156 (Va. 1997) (holding that a power company "can permit a telephone company and a cable television company to attach their lines to the power company's poles without the consent of the servient estate owner"); Centel Cable Television Co. v. Cook, 567 N.E.2d 1010, 1014 (Ohio 1991) (holding that an easement granted by a property owner to an electric utility was "broad enough to encompass the development and expansion of the electronic medium of cable television.");

Pursuant to the operation of a number of rules of judicial construction developed over the last century, the modern view is that utility easements are apportionable.[143] For example, where it is unclear whether an easement holder may grant a license to a third party to use an easement for its own purposes, courts look to the nature of the easement. Utility easements are generally classified as "easements in gross" -- "easements which belong to the owner independently of his ownership or possession of other land, and thus lacking a dominant tenement."[144] By contrast, an "easement appurtenant" is "one whose benefits serve a parcel of land. More exactly, it serves the owner of that land in a way that cannot be separated from his rights in the land."[145] While "[t]ypical examples of easements appurtenant are walkways, driveways, and utility lines across Blackacre, leading to adjoining or nearby Whiteacre," examples of easements in gross "are easements for utilities held by utility companies."[146]

Witteman v. Jack Barry Cable Co., 228 Cal. Rptr. 584, 590 (Cal. App. 2d Dist. 1986) (holding that "apportionment of use to [a cable television company] by the holders of [utility] easements . . . without the consent of the homeowner-possessor of the servient tenement, is supported by basic real property law principles, present statutory law, and a growing body of decisional law"), review dismissed and cause remanded, 742 P.2d 779 (Cal. 1987), cert. denied, 484 U.S. 1043 (1988); Henley v. Continental Cablevision of St. Louis County, Inc., 692 S.W.2d 825, 827 (Mo. Ct. App. 1985) ("The owner of an easement may license or authorize third persons to use its right of way for purposes not inconsistent with the principal use granted."); Salvaty v. Falcon Cable Television, 165 Cal. App.3d 798, 805 (Cal. App. 2d Dist. 1985) (holding that a cable company was not required to obtain the permission of the underlying property owner because the utility easement was apportionable and the cable attachment was within the scope of the easement); American Telegraph & Telephone Co. of Mass. v. McDonald, 175 N.E. 502, 503 (Mass. 1930) (holding that a grantee of an easement to erect, operate, and maintain telephone lines on the a landowner's property may assign a similar use to a third party).

143 Centel Cable Television Co., 567 N.E.2d at 1014.

144 Henley, 692 S.W.2d at 827.

145 Abbott v. Nampa School District, 808 P.2d 1289, 1295 (Ida. 1991) (*citing* R. Cunningham, W. Stoebuck and D. Whitman, The Law of Property § 8.2, p. 440 (Hornbook Series Lawyer's Edition (1984)).

146 Abbot, 808 P.2d 1289 at 1295 (*citing* R. Cunningham, W. Stoebuck and D. Whitman, The Law of Property § 8.2, p. 440 (Hornbook Series Lawyer's Edition (1984)); see also Alan David Hegi, The Easement in Gross Revisited: Transferability and Divisibility Since 1945, 39 VAND. L. REV. 109, 115 (1986) ("[M]ost courts consider utility easements to be easements in gross . . . .") (hereinafter, "Hegi").

Courts have considered that whether an easement is apportionable will depend on whether it is "viewed as exclusive as opposed to non-exclusive."[147] An easement will be considered "exclusive" where the grantor does not "intend[] to participate in the use or privilege granted," as with a utility easement.[148] "This principle stems from the concept that one who grants to another the right to use the grantor's land in a particular manner for a specified purpose but who retains no interest in exercising a similar right himself, sustains no loss if, within the specifications expressed in the grant, the use is shared by the grantee with others."[149] Under this rule, most utility easements are considered apportionable because it is traditionally believed that property owners generally do not engage in the provision of telecommunications and other utility services. Moreover, the principle behind this rule demonstrates that the apportionment of a utility easement does not serve to "expand" the easement, as its divisibility is deemed to have been contemplated when it was originally granted as an "exclusive" easement by the property owner.[150]

Similarly, courts have "infer[red] apportionability where the right to apportion the easement increases the easement's value to the holder of the estate."[151] For example, in the context of use by cable television operators of utility easements, courts have observed that the

---

147 Salvaty, 165 Cal. App. at 804.

148 Henley, 692 S.W.2d at 828.

149 Id. at 827.

150 See Henley, 692 S.W.2d at 829 ("The addition of cable and equipment to already existing poles was held to constitute no additional burden since the defendant was doing only what the utilities were enabled to do."); see also Jolliff v. Hardin Cable Television Co., 269 N.E.2d 588, 591 (Ohio 1971) ("[T]he attachment of a television coaxial cable . . . is a use similar to that granted in the easements to Ohio Power. In fact, such use constitutes no more of a burden than would the installation of telegraph and telephone wires. That burden was clearly contemplated at the time of the grants . . . .").

151 Centel Cable Television Co., 567 N.E.2d at 1014.

owners of the servient estate "will be benefited by the availability of cable television resulting from the increase in use of the easements sought by the [cable company]."[152] Put another way, many courts have held that "[c]ommercial easements in gross for utilities are particularly alienable and transferable" due to the public benefits that they provide and the need for a "sufficiently broad interpretation to meet progressive inventions."[153]

Because utility easements are usually considered exclusive easements in gross, they are considered by a majority of courts to be apportionable.[154] As discussed in more detail above in Section V.C., installation of telecommunications facilities and equipment in MTEs to reflect technological developments would not create an additional burden on the servient estate and would therefore be consistent with the scope of utility easements.[155] Moreover, use of utility easements and rights-of-way in MTEs by competitive providers involves a commercial use that provides significant public benefits. The Commission has recognized that the promotion of increased competition among telecommunications providers in MTEs will serve the public interest.[156] Construction of utility easements as apportionable for use by telecommunications providers is consistent with judicial precedent because such use would actually increase the

---

152 Hoffman, 52 A.D.2d at 316.

153 Hoffman, 52 A.D.2d at 317; see also Crowley v. New York Tel. Co., 80 Misc.2d 570, 572 (N.Y. Dist. Ct. 1975) (recognizing that the public benefits of cable television require that a utility easement be construed as liberally as the language of the easement will allow).

154 Hegi at 115.

155 See, e.g., Henley, 692 S.W.2d at 829; Jolliff, 269 N.E.2d at 591.

156 See *Report and Order* at ¶ 12 ("[A]n absence of widespread competition in MTEs would insulate incumbent LECs from competitive pressures and deny facilities-based competitors the ability to offer their services in a sizeable portion of local markets, thereby jeopardizing full achievement of the benefits of competition.")

value of the servient estate.[157] Contrary to the comments of parties such as RAA and several utilities, use by telecommunications carriers of utility easements within MTEs is consistent with judicial precedent concerning the apportionability of such easements.

E. ADOPTING AN APPROPRIATELY FLEXIBLE DEFINITION OF RIGHTS-OF-WAY UNDER SECTION 224 WOULD NOT BE DISRUPTIVE TO MTES.

Some commenters claim that issues of safety, capacity, and reliability prevent the Commission from adopting a more expansive, technologically neutral definition of rights-of-way in order to promote competition among telecommunications service providers.[158] However, these concerns should not preclude the Commission from fully implementing Section 224. Issues of capacity, safety, reliability, and engineering concerns were considered by Congress and included in the statute as appropriate bases for a utility to deny a telecommunications carrier access to a right-of-way in the absence of discrimination.[159] Section 224 represents Congress' intent that utilities must be prepared to accommodate requests for access to rights-of-way and other facilities in MTEs by telecommunications carriers unless such access is truly not feasible.[160] Thus, these concerns should not prevent the Commission from fully implementing Section 224.

The Commission also must reject commenters' predictions of the potential for disruption of tenants' building operations.[161] Utilities have previously alleged that telecommunications

---

157 See, e.g., Hoffman, 52 A.D.2d at 316; Crowley, 80 Misc. 2d at 572.

158 See BBO Comments at 21 (There would be no method to ensure that competitive providers comply with methods and procedures for installation of facilities "to ensure tenant safety and to preserve the integrity of the property."); CAI Comments at 4 (There is "finite capacity of conduit and rights-of-way.").

159 47 U.S.C. § 224(f)(2) (A utility is permitted to deny access to its right-of-way where there is "insufficient capacity and for reasons of safety, reliability and generally applicable engineering principles.").

160 *Local Competition First Report and Order* at ¶ 1151.

161 See Verizon Comments at 10.

facilities are not compatible with utility operations.[162] However, there are established industry guidelines for installing communication wires and cables in the same space with other conductors, such as electric light or power circuits.[163] Compliance with industry codes will ensure that access by competitors is not disruptive to utility services or MTE tenants.[164]

In addition, contrary to RAA's statement that CLECs will be installing "multiple sets of wires helter skelter" in MTEs,[165] the number of CLECs seeking access and installing equipment in utility rights-of-way will be constrained by the ability of the CLECs to receive an adequate return on their investments. As evidenced in the States that have required MTE owners to provide access to competitors on a nondiscriminatory basis, such as Texas and Connecticut, for example, the number of facilities-based competitors seeking access to a particular property typically is reasonably limited. Thus, it is preferable to allow market forces to limit the number of competitors that will serve a building. In the unlikely event that space or other feasibility concerns become a problem, it is appropriate to address them on a nondiscriminatory basis.

F. A BROAD DEFINITION OF RIGHTS-OF-WAY UNDER SECTION 224 WOULD NOT CREATE FIFTH AMENDMENT TAKINGS ISSUES.

Commenters claim that a broad definition of rights-of-way would result in a Fifth Amendment taking because the "significantly increased intrusion" on the building owner's property "was not considered at the time access to poles, ducts, conduits, and rights-of-way was

---

162 See FPL Comments, WT Docket No. 99-217, at 13 (filed Aug. 26, 1999).

163 National Electric Code Handbook 859 (7th ed. 1996).

164 Moreover, utilities are themselves developing ways to utilize electrical wires to deliver a wide range of telecommunications services. See Ross Kerber, "Utilities Reach Out to Add Phone, Cable Service," Wall St. J. at B1 (Jan. 27, 1997).

165 RAA Comments at 60.